BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRI L. ALKIRE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,336
SPEARS MANUFACTURING CO.	)	
Respondent	)	
	)	
AND	)	
	)	
ZURICH NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the February 23, 2012, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Workers Compensation Board heard oral argument on June 15, 2012, in Wichita, Kansas.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties agreed that claimant has an 18% whole body permanent functional impairment and a 68% work disability. The parties also agreed the only issue is whether claimant is permanently and totally disabled.

ISSUES

In the February 23, 2012, Award, ALJ Moore found claimant sustained an 18% whole body functional impairment and a work disability of 68%, which was based upon a 100% wage loss and a 36% task loss. The ALJ also determined claimant failed to sustain her burden of proof that she is permanently and totally disabled. ALJ Moore awarded

claimant temporary total and permanent partial disability benefits. Claimant asserts she is permanently and totally disabled. Respondent requests the Board affirm the Award.

The issue before the Board on this appeal is:

Is claimant permanently and totally disabled?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On November 12, 2008, while working for respondent, claimant sustained a low back injury at L5-S1. Claimant's job was in the bar coding area, where she held five different jobs. One of claimant's jobs was palletizing. She weighed boxes of parts to make sure they were the proper weight for the contents. If a box weighed too much, claimant removed parts and if the box weighed too little, she added parts. She would then tape the boxes and place them on a pallet for shipment. Although no box weighed more than 25 pounds, claimant testified she was required to occasionally lift more than 50 pounds. Claimant testified her jobs at respondent required her to twist and lift.

Claimant was discharged on February 9, 2009, for excessive absenteeism. Claimant indicated she missed a number of days at work because of her back injury. Claimant testified that since she was discharged for absenteeism, respondent has never offered her employment. Because claimant hurts too much, she has not applied for employment with respondent or anywhere else. Claimant also believes there is no job at respondent she can do.

Claimant was treated by Drs. Gregory Mears and Christopher Covington. Dr. Covington, a neurosurgeon, performed an L5-S1 microdiscectomy in April 2009. Claimant receives ongoing pain management from Dr. Scott Anthony, which includes a prescription for Lortab, Gabapentin and a muscle relaxant. Claimant testified she takes Lortab four times a day and the other medications three times a day. Claimant testified the medications make her drowsy, cause her difficulty concentrating and prevent her from driving. She also cannot stand or sit for more than 15 to 20 minutes without pain. Claimant testified that sitting more than 15 to 20 minutes also causes numbness in her legs. Claimant has difficulty sleeping at night due to pain and takes three to four naps a day.

At the time of the Award claimant was 52 years of age. She completed the ninth grade and was always in special education classes. Claimant has no other formal education and has not obtained a GED. Claimant testified she can read a book, but would not understand it. When claimant reads the newspaper, she generally understands what she is reading, but does not know the meaning of big words. She has difficulty reading and

writing. The record indicates claimant began receiving Social Security disability benefits in 2011.

At the request of her attorney, claimant was administered IQ tests by Mary Lynn Sylvester, a school psychologist. Ms. Sylvester testified the test results indicated claimant had the: (1) broad reading level of a fifth grader, second month, (2) broad math skills of a second grader, ninth month, (3) math reasoning of a second grader, third month, (4) grade equivalent for quantitative concepts of a first grader, eighth month, (5) reading vocabulary of someone beginning second grade, (6) grade equivalent for writing skills of a first grader, sixth month, and that (7) claimant's academic knowledge was less than that of a Kindergartner and the age equivalent of a child the age of four years, one month.

Ms. Sylvester testified the nonverbal IQ of claimant was 72, placing her in the bottom 3%; claimant's verbal IQ was 81, placing her in the bottom 10%; and claimant's full scale IQ was 75, placing her in the bottom 5%. Claimant's full scale IQ is the equivalent of an eight-year, eleven-month-old person. The report of Ms. Sylvester indicated claimant was cooperative, focused, never off-task and never distracted.

At his deposition, Dr. Covington recommended restrictions of lifting no more than 35 to 40 pounds occasionally, and lifting no more than 10 pounds on a frequent basis.[1] He also indicated claimant should avoid climbing, repetitive bending and stooping, and persistently working overhead.[2] Dr. Covington testified that if claimant returned to assembly line type of activity including repetitive bending and stooping, she would likely reinjure her spine. He testified claimant was currently caring for her grandchildren. Claimant, however, was not asked any details about caring for her grandchildren, including their ages, what tasks she performed or the number of hours she cared for them.

Claimant was examined at the request of her attorney on January 2 and September 8, 2009, and January 24, 2011, by Dr. Edward J. Prostic, an orthopedic physician. Following the January 24, 2011, examination, he opined claimant physically could engage in light/medium level employment. Dr. Prostic issued restrictions of occasional lifting of no more than 30 pounds, knees to shoulders, and frequent lifting of no more than 15 pounds, knees to shoulders. He further restricted claimant from work below knee level or above shoulder height. Dr. Prostic also indicated claimant should avoid forceful pushing or pulling, frequent bending or twisting at the waist, use of vibrating equipment, or captive positioning.[3]

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[1] Covington Depo. at 13. Dr. Covington indicated he considered a 50-pound lifting restriction when assessing claimant's task loss. Covington Depo. at 17, 21.

[2] *Id.*, at 14, 18.

[3] Prostic Depo. (Apr. 6, 2011) at 20.

Dr. Prostic testified on two occasions. At both of his depositions (April 6, 2011, and September 20, 2011), Dr. Prostic opined claimant was unable to perform substantial and gainful employment in the open labor market and was permanently and totally disabled as a result of the injuries she sustained on November 12, 2008. Dr. Prostic testified that he took into consideration claimant's restrictions, her academic achievement test, IQ and the vocational report of Ms. Terrill.[4]

Vocational expert Karen Crist Terrill testified she obtained from claimant an educational and work history. Ms. Terrill did so by having claimant complete a Work and Education History Form followed up by a telephone interview. Claimant testified she was unable to understand the questionnaire. Claimant was read the questionnaire by her daughter and her daughter completed the questionnaire. Ms. Terrill also reviewed the September 8, 2009, and January 24, 2011, reports of Dr. Prostic. Ms. Terrill also reviewed the regular hearing testimony of claimant and the report of Ms. Sylvester. Ms. Terrill testified that because of back pain, claimant had not attempted to find work since being discharged by respondent. Ms. Terrill also indicated claimant's computer skills are limited to sending emails and she does not know how to send an attachment. Claimant types using one finger.

Based on claimant's age, education, the results of claimant's achievement testing, IQ, past relevant work, physical restrictions and November 12, 2008, work injury, Ms. Terrill opined claimant is unable to perform substantial gainful employment in the open labor market. Ms. Terrill's September 9, 2010, report and subsequent reports did not mention the fact claimant was taking three prescription drugs, the fact claimant alleges she is in near constant pain, her fatigue or that she takes three to four naps daily. Ms. Terrill also opined that claimant performed 19 non-duplicative job tasks at her places of employment in the 15 years prior to her accident.

Steve Benjamin, vocational rehabilitation counselor, asked claimant to complete an education/employment history report and followed it up with a personal interview on October 7, 2011. He reviewed the medical records of Drs. Anthony, Covington and Prostic as well as the report of Ms. Sylvester. Mr. Benjamin testified that in the 15 years prior to claimant's injury, she worked at entry-level positions, but did not identify the claimant's job tasks.

Mr. Benjamin opined there were significant numbers of entry-level jobs within 50 miles of claimant's home that claimant can perform. He testified the opinion was based upon the restrictions of Dr. Covington or Dr. Prostic. When asked why claimant's medications and information about claimant's pain were not included in his report, Mr. Benjamin testified that he trusted the doctors considered the medications and any side effects claimant experienced when they wrote their restrictions. Mr. Benjamin testified,

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[4] *Id.*, at 24-25.

"And I was only asked to look at the restrictions from the physicians; I was not asked to look at the claimant's perceived limitations."[5] Mr. Benjamin's report did not mention the fact claimant was taking three prescription drugs, that claimant testified she is in near constant pain, her fatigue or that she takes three to four naps daily.

Some of those jobs that Mr. Benjamin opined claimant could do included companion, day care worker, housekeeper, store greeter and waitress. Mr. Benjamin identified potential employers looking to fill those positions, but could not verify the salaries paid by the employers. There is nothing in Mr. Benjamin's report indicating that he checked with respondent to see if it had a position available for claimant.

Upon cross-examination, Mr. Benjamin agreed that the position of day care worker might require lifting a child that weighed in excess of claimant's weight restrictions. He also acknowledged that a housekeeper's job could require claimant to flip mattresses, lift 10 pounds frequently and possibly crouch and kneel. Mr. Benjamin agreed there were no store greeter jobs within a 50-mile radius of claimant's home. He also indicated claimant could make change as a waitress having a ninth grade education, but he was unaware her math skills were at a level lower than the ninth grade. The job of companion would require claimant to read to the client and possibly drive the client to appointments.

Jason Moore, respondent's Human Resource Manager, testified the single heaviest pack on the lines claimant normally worked at respondent weighed just less than 15 pounds. He also indicated the heaviest weight claimant lifted was 25 pounds. After her accident, claimant worked for respondent within her temporary work restrictions. Mr. Moore testified claimant's absenteeism problems began before claimant's accident and claimant was not counted absent when she attended medical appointments for her work injury. At his deposition, Mr. Moore testified that respondent was currently filling positions in the bar code area where claimant worked. He indicated there was nothing to keep claimant from working in the bar code area and that respondent had other jobs available, which required even lighter physical exertion.

ALJ Moore determined claimant failed to sustain her burden of proof that she was permanently and totally disabled. He stated in the Award,

> Here, Claimant is 54 *[sic]* years old and retains the physical ability to engage in entry level jobs with wages comparable to those she was earning at the time of her injury. Her limited mental and academic functioning were not a bar to obtaining entry level positions in the past, and do not appear a factor in whether she can find a similar entry level position in the future.[6]

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[5] Benjamin Depo. at 27.

[6] ALJ Award (Feb. 23, 2012) at 8.

ALJ Moore went on to state that according to Dr. Covington, claimant is currently providing day care for her grandchildren, which is a job Mr. Benjamin identified claimant can still perform.

Dr. Covington and Dr. Prostic provided opinions with regard to claimant's whole body functional impairment and task loss. As indicated above, at oral argument before the Board the parties agreed claimant has an 18% whole body permanent functional impairment and a work disability of 68%.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[7] K.S.A. 44-510c(a)(2) states in part, "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

As pointed out by ALJ Moore in his Award, *Wardlow*[8] requires the fact finder to take into consideration the age, training, previous work history, and physical limitations when determining if an employee is permanently and totally disabled. *Wardlow* also obligates the fact finder to consider the totality of an employee's circumstances, including driving and transportation problems, being in constant pain, and having to change body positions.

In *Gann*,[9] the Board determined claimant was permanently and totally disabled. The Board in *Gann* took into consideration claimant's restrictions, chronic pain syndrome,

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[7] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[8] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

[9] *Gann v. USF Dugan*, Docket No. 245,887, 2004 WL 1810305 (Kan. WCAB July 30, 2004).

having to alternate body positions and that claimant was on a significant number of medications, including Lortab. In *Reiter*,[10] the Board stated, "When the effects of the narcotic pain medications are also considered, realistically there are no positions she can perform full time."

Dr. Prostic and Ms. Terrill opined claimant was unable to obtain substantial and gainful employment, while Mr. Benjamin gave an opposing opinion. Ms. Terrill took into consideration claimant's age, education, the results of her achievement testing, IQ, past relevant work and physical restrictions. Dr. Prostic testified that he took into consideration claimant's restrictions, academic achievement test, IQ and the vocational report of Ms. Terrill. Neither Mr. Benjamin nor Ms. Terrill took into consideration the side effects of the medications claimant is taking, her claims of chronic pain or her testimony that she takes three to four naps daily. Nor did they mention in their reports that claimant no longer drives. Mr. Benjamin indicated he took into consideration claimant's restrictions, not claimant's perceived limitations. He assumed the physicians took into consideration the medications claimant was taking and any side effects claimant experienced when they assigned claimant her restrictions.

Claimant's physical restrictions place her in the light/medium level of employment. Claimant has many other impediments to obtaining substantial and gainful employment, which when combined with her physical restrictions, make her permanently and totally disabled. Claimant is in her early to mid-50s and has performed only entry-level jobs. She only completed the ninth grade and was in special education classes. Claimant's general academic knowledge is less than that of a Kindergartner, her math skills are generally that of a second grader and her writing skills are on a first grade level. She is taking prescription medications, which make her drowsy, cause her difficulty concentrating and prevent her from driving. The Board finds, after taking into consideration the totality of claimant's circumstances, that she is permanently and totally disabled.

CONCLUSION

Claimant is permanently and totally disabled.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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[10] *Reiter v. State of Kansas*, Docket Nos. 1,009,450 & 1,030,997, 2009 WL 2480237 (Kan. WCAB July 27, 2009)

[11] K.S.A. 2011 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the February 23, 2012, Award entered by ALJ Moore by finding claimant is permanently and totally disabled.

Terri L. Alkire is granted compensation from Spears Manufacturing Co. and its insurance carrier for a November 12, 2008, accident and resulting disability. Based upon an average weekly wage of $342.80, Ms. Alkire is entitled to receive 13.29 weeks of temporary total disability compensation at the rate of $228.54 per week, or $3,037.30, followed by permanent total disability compensation at the rate of $228.54 per week, or $121,962.70, for a total award not to exceed $125,000.00 for a permanent total disability.

As of August 1, 2012, there is due and owing to Ms. Alkire 13.29 weeks of temporary total disability compensation at the rate of $228.54 per week, or $3,037.30, plus 180.71 weeks of permanent total disability compensation at the rate of $228.54 per week, or $41,299.46, for a total due and owing of $44,336.76, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $80,663.24 shall be paid at $228.54 per week until fully paid or until further order.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge